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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 947

TEN INDIVIDUAL DEFENDANTS, NET LIMITED, INC. AND SPECIAL INVESTMENTS, INC.,
Petitioners

v.

INDIAN LAKE ESTATES, INC.,
Respondent

On Petition for a Writ of Certiorari to the United State Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 350 F.2d 435. The orders of the district court (Pet. App. 14a-16a) are not reported. The orders of the court of appeals denying rehearing (Pet. App. 16a-17a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1965. Rehearing was denied on October 7, 1965. The time within which to file the petition for certiorari was

extended to January 25, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the appeal taken by respondent on April 9, 1964, was timely, and thus the court of appeals had jurisdiction of the case.

2. Whether the court of appeals was correct in reversing the district court remanding the case for trial and affording respondent an opportunity to establish a claim under the Loan Shark Law, §26-601, D.C. Code (1961).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 12(b)(6). Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.

* * * * * *

(b) *How Presented.* * * * (6) Failure to state a claim upon which relief can be granted, * * *. If on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, * * *.

STATEMENT

On October 25, 1960, plaintiff filed its complaint against ten named individuals and two corporate defendants, alleging violations of the usury statute, D.C. Code §28-2703 (1961), and also of the Loan Shark Law, D.C. Code §26-601-611 (1961); the amounts in controversy were alleged to be in excess of five and one-half million dollars. On October 18, 1961, the District Court granted defendants' motion for summary judgment.

On appeal, the United States Court of Appeals for the

District of Columbia Circuit reversed the grant of summary judgment. *Indian Lake Estates, Inc.* v. *Lichtman et al,* 311 F.2d 776, 777 (1962). The Court of Appeals, recognizing that respondent's claim was predicated on violations of both the usury statute and the Loan Shark Law, noted that the " * * * relationships of the litigants which are challenged as illegal and void arise out of numerous and complex contractual engagements, involving millions of dollars in the aggregate." Summarizing its reasons for reversal, the appellate court stated that the " * * * complex issues of fact and law as well as some which are mixed questions of law and fact, * * * were not susceptible of disposition by summary judgment." The appellate court concluded its brief opinion, citing *Royall* v. *Yudelevit,* 106 U.S. App. D.C. 1, 268 F.2d 577 (1959), an earlier decision of the same court, involving the usury statute and the Loan Shark Law.

Following reversal and remand to the District Court, respondent filed its first amended complaint alleging again that some 17 business dealings between the parties had been concluded in violation of both the usury statute and the Loan Shark Law and sought damages under the usury statute in the amount of $1,291,000, and damages under the Loan Shark Law in the amount of $2,125,819.31.

On September 13, 1963, petitioners filed a motion to dismiss under Rule 12(b)(6), on the ground that the complaint had failed to state a claim upon which relief could be granted and cited in support thereof a recent amendment to the District of Columbia Business Corporation Act providing:

> "No corporation formed hereunder shall plead any statutes against usury in any action." (D.C. Code §29-904(h)).

An order was entered on December 3, 1963, granting petitioners' motion to dismiss but "with leave to amend within twenty days." A further order, on December 19, 1963, ex-

tended the time within which an amended complaint might be filed to January 2, 1964, and also made provision under Rule 54(b) because of the presence of multiple claims and multiple parties.

On January 2, 1964, respondent filed its second amended complaint, in which, for the first time, respondent *pleaded* that it was a Florida corporation which had been issued a certificate of withdrawal by the Superintendent of Corporations of the District of Columbia and, hence, was not subject to the restriction on pleading usury recently placed on District of Columbia business corporations.

Petitioners renewed their motions to dismiss, under Rule 12(b)(6), for failure to state a claim and the same were granted on March 24, 1964. Respondent's appeal from the March 24, 1964, order was taken on April 9, 1964.

On August 4, 1965, dismissal by the District Court was again reversed by the United States Court of Appeals for the District of Columbia Circuit in an opinion which is reproduced in Petitioners' Appendix, and reported at 350 F.2d 435. In essence, the decision holds that respondent's appeal was timely, that, therefore, the court had jurisdiction of the case and that, while respondent was barred from pleading usury, it was entitled to a trial on the merits on its claim for relief under the Loan Shark Law. After petitions for re-hearing, by division or *en banc*, were denied by the Court of Appeals, petitioners asked this Court to grant certiorari.

ARGUMENT

There are several reasons, each of which alone would be sufficient, why this court should deny the petition for certiorari. In this case, filed in October 1960, and not yet tried, the United States Court of Appeals for the District of Columbia Circuit has twice recognized respondent's right to a trial on the merits of its claim based on violations of District of Columbia law licensing money-lenders. This

Court has often stated its policy of leaving the interpretation of the laws of the District of Columbia to the courts of the District of Columbia.

> "Matters relating to law enforcement in the District are entrusted to the courts of the District. Our policy is not to interfere with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed." *Fisher* v. *United States,* 328 U.S. 463, 476, 66 S. Ct. 1318, 1325 (1946).
>
> "In making reference to that law, we are mindful of our policy of not interfering with local rules of law fashioned by the courts of the District of Columbia." *Miller* v. *United States,* 357 U.S. 301, 306 (1958).
>
> *"We are normally content to leave undisturbed decisions by the Court of Appeals for the District of Columbia Circuit concerning the import of legislation governing the affairs of the District." General Motors Corporation* v. *District of Columbia,* 385 U.S. 553, 14 L. Ed. 2d 68, 85 S. Ct. —— (1965). (Emphasis supplied.)

The Loan Shark Law has been in effect in the District of Columbia since 1913, and the Court of Appeals for the District of Columbia Circuit has had at least five occasions to construe and apply its provisions, the last two opinions involving the case at bar. The Court of Appeals has consistently sustained the right of claimants to establish entitlement to relief for violations of the licensing provisions of the Loan Shark Law. On one previous occasion, this Court declined to review a decision of the Court of Appeals for the District of Columbia Circuit construing and applying the Loan Shark Law in a manner consistent with the decision sought to be reviewed here. *Hartman* v. *Lubar,* 77 U.S. App. D.C. 95, 133 F.2d 44, cert. den., 319 U.S. 767 (1943).

Furthermore, the decision of the Court of Appeals is eminently correct and consistent with its earlier opinions defining the purpose and scope of the Loan Shark Law.

The court below, while noting that the 1963 amendment

to the District of Columbia Business Corporation Act barred respondent's claim under the usury statutes, carefully distinguished between a litigant's rights under the usury laws and those which arise as a result of a licensing statute such as the Loan Shark Act.

Disregarding the clear distinction spelled out in the opinion below, petitioners persist in contending that the Loan Shark Law is merely another usury statute, and thus that the 1963 amendment to the Business Corporation Act prevents respondent, as a corporation, from pleading any statute against usury. Petitioners' argument totally ignores both the earlier decisions of the Court of Appeals construing the Loan Shark Act and the historic difference between the body of law concerned with usury and the law's treatment of contracts made in violation of statutes against public policy.

As noted in the opinion below, the Court of Appeals, as early as 1914, held that the Loan Shark Law " * * * is not a usury statute * * * ". *Reagan* v. *D.C.*, 41 D.C. App. 409, 412. The Court of Appeals also cited its earlier decisions in *Hartman* v. *Lubar*, 77 U.S. App. D.C. 95; 133 F. 2d 44 (1942) and *Royall* v. *Yudelevit*, 106 U.S. App. D.C. 1; 268 F. 2d 577 (1959). In *Hartman, supra,* the Court of Appeals noted that a contract made in violation of the Loan Shark Law was illegal and void. In *Royall, supra,* the Court of Appeals elaborated on the effect of a violation of the Loan Shark Law by stating that a different and separate cause of action flows from said violation, than arises as a result of transgressing a usury statute.

> "A lender in a loan contract which is merely usurious may not be liable in damages. But if there is added to the situation the fact that the lender was not licensed as required by law, the loan contract is unlawful and void, and a foreclosure thereunder is wrongful and gives rise to an action for damages suffered therefrom." *Royal, supra,* 268 F. 2d, at page 580.

Construction of the Loan Shark Law as contained in the opinion below, and in the earlier decisions of the Court of Appeals, is obviously based on an awareness that usury and licensing statutes are predicated on clearly distinguishable principles.

The statute concerning usury in the District of Columbia provides that a person paying usurious interest is merely entitled to recover "the amount of the unlawful interest so paid". §28-2704, D.C. Code (1961 Ed.) The District of Columbia statute thus establishes a measure of damages for a usurious bargain but does not render the contract or agreement illegal or void.

The opposite is true, however, as to a contract made in violation of the Loan Shark Law. In *Hartman* and *Royall, supra,* the Court of Appeals uses the following four adjectives to describe a contract in violation of the Loan Shark Law—illegal, unenforceable, unlawful and void. In *Hartman, supra,* the Court of Appeals said:

> "The Act, which appears in the 1940 Revision of the District of Columbia Code as Section 26-601 et seq., makes it 'unlawful and illegal to engage in the District of Columbia in the business of loaning money upon which a rate of interest greater than six per centum per annum is charged on any security of any kind, direct or collateral, tangible or intangible, without procuring license * * *.' If the disputed loan was made by one who was engaging in the business of lending money in violation of the law, and if the loan was made in the course of that business, then it constituted an illegal contract. The general rule is that an illegal contract, made in violation of a statutory prohibition designed for police or regulatory purposes, is void and confers no right upon the wrongdoer. The present case comes under no exception to the general rule. Every consideration of public policy suggests that a contract made in violation of the Loan Shark Law should be unenforceable." 133 F. 2d. at p. 45.

Separate and distinct causes of action arise under usury

statutes, than are created by violations of licensing ordinances, bottomed on the police power of the state. There is nothing in the 1963 amendment to the D.C. Business Corporation Act indicating the slightest intention, on the part of Congress, to take away from corporations their right to assert violations of a licensing statute that has been the law of this jurisdiction since 1913.

Contrary to petitioners' contention, the effect of the Court of Appeals' decision will not be any windfall to corporate borrowers, but rather a timely reminder that anyone in the business of lending money must abide by the sound and reasonable provisions of District of Columbia laws and regulations designed to protect financially necessitous citizens from unscrupulous lenders.

Respondent's procedural argument that the appeal was untimely revolves around a perfectly irrelevant discussion of Rule 54(b). At the same time, there is a painfully obvious refusal by respondent to discuss the only pertinent rule involved, namely, 12(b)(6), governing a motion to dismiss for failure to state a claim upon which relief can be granted.

After the dismissal of the first amended complaint, the respondent sought a Rule 54(b) order, because of the multiplicity of parties and claims involved herein. Upon the filing of a second amended complaint, the previous Rule 54(b) order was superseded and became of no effect.

The reason that respondent's appeal was timely is found in the clear language of Rule 12(b)(6) and the judicial precedents interpreting and applying said rule.

After the adoption of the Federal Rules, many courts held that the motion to dismiss for failure to state a claim (12(b)(6)) was no different from the old demurrer and that such motion was therefore limited to matters appearing on the face of the complaint. Owing to a lack of uniformity in said view, however, the Rules were amended in 1946 by the addition of a sentence to Rule 12(b)(6) reading:

"If, on a motion asserting the defense numbered (6)

> to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion *shall* be treated as one for summary judgment *and disposed of as provided in Rule 56,* and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." (Emphasis supplied.)

The Court of Appeals, in the opinion below, on pages 4 through 8 (Pet. App. 4a-8a), took great pains to explore the state of the record, particularly the contents of the First Amended Complaint before the District Court at the time of petitioners' first motion to dismiss, and, thereafter, the contents of the second amended complaint at the time of the second motion to dismiss, both made under Rule 12(b)(6). The Court of Appeals correctly found that the First Amended Complaint did not put in contention, *on the pleadings,* the consequences of §29-933a, D.C. Code (1961 Ed.). As noted by the Court of Appeals, the First Amended Complaint did not contain an allegation predicated on respondent having been granted a certificate of withdrawal as permitted by §29-933a, *supra.* Also, the Court of Appeals observed on page 7 of its opinion, footnote 11 (Pet. App. 7a), that the record does not show whether or not the first judge considered or how he interpreted §29-934d, D.C. Code (1961).

It is of critical importance procedurally that the first judge granted petitioners' Motion to Dismiss under Rule 12(b)(6), *with leave to amend,* and *did not* dispose of the motion as one for summary judgment. Having so dealt with petitioners' motion, the first judge, following the clear language of Rule 12(b)(6), and decisions of the Court of Appeals for the District of Columbia, and other courts interpreting said rule, *necessarily excluded all matter outside the pleadings.* As the Court of Appeals notes on page 6 of its opinion:

> " * * * the second amended complaint placed before the second judge, *on the pleadings,* an issue as to whether or not a foreign corporation previously qualified, possessed different status when it actually filed in advance of suit a certificate of withdrawal as permitted by section 29-933a." (Pet. App. 6a).

Since the Second Amended Complaint placed, *on the pleadings,* an important issue not contained in the First Amended Complaint, the Second Amended Complaint was for *all purposes* a valid and substantive amendment of the First Amended Complaint. The Court of Appeals was thus indisputably correct in finding that an appeal from the dismissal of the Second Amended Complaint was proper and that the Court of Appeals had jurisdiction of the case.

The petition for certiorari is, on its face, inadequate in that it completely avoids any reference to either Rule 12(b)(6) or the large body of judicial precedents concerned therewith. The Court of Appeals was eminently correct in relying on *Richardson* v. *Rivers,* 118 U.S. App. D.C. 333; 335 F. 2d 996 (1964), where it was found that matters outside the pleading were presented and thus the motion should have been treated as one for summary judgment. In this case, the converse was true, namely, that since the first judge granted the motion to dismiss, and did not treat it as one for summary judgment, he necessarily excluded anything not found within the four corners of the Complaint. Among the many other decisions adumbrating this rule are *Grand Opera* v. *Twentieth-Century-Fox Film Corp.,* 235 F. 2d 303, 307 (7th Cir. 1956), stating that on a Rule 12(b) motion a District Judge "had no right to consider any facts except those well-pleaded in the amended complaint."

"It is *elementary* that on a motion to dismiss the complaint, the Court may consider nothing except the pleading." *Holmberg* v. *Williamson,* 135 F. Supp. 493, 494 (S.D.N.Y. 1955). (Emphasis Supplied)

In *Temp-Resisto Corp.* v. *Glatt,* 18 F.R.D. 148, 151 (D.N.J. 1955), the Court said: "In deciding the motion to dismiss the Court must disregard the affidavits and consider only the allegations of the complaint."

In *Sears, Roebuck & Co.* v. *Metropolitan Engravers,* 245 F. 2d 67, 70 (9th Cir. 1956), that court, discussing the function of Rule 12(b)(6), said:

> "The court was not considering a motion for summary judgment. Consideration was therefore limited to matters appearing on the face of the pleadings. The applicable rule expressly so provides.[5] " (Footnote 5 quotes the language of 12(b)(6)).

Since, as the Court of Appeals found, the second amended complaint was a substantive amendment of the pleadings, the respondents were justified in taking their appeal from the dismissal thereof, and, hence, said appeal was timely and conferred jurisdiction on the Court of Appeals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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